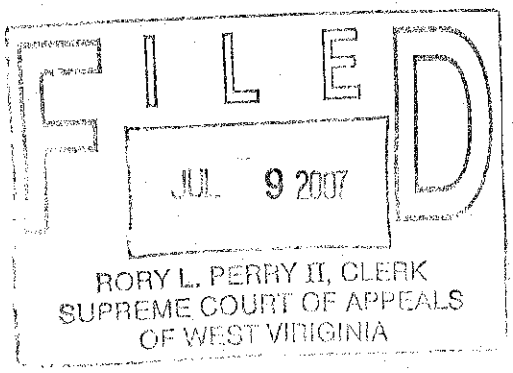
NO. 33063

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



JAMES BLAINE WALDRON,

Petitioner,

v.

TOM SCOTT, Southwestern Regional Jail Administrator,
JIM RUBENSTEIN, Commissioner, and
WEST VIRGINIA DIVISION OF CORRECTIONS,

Respondents.

BRIEF OF THE RESPONDENTS

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

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304-558-2021

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BRIEF OF THE RESPONDENTS

I.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

This is an appeal from the September 25, 2006 Order of the Circuit Court of McDowell County, denying Petitioner's "Petition for Writ of Habeas Corpus." This Honorable Court granted the appeal as to Issue No. 1 only: whether the court below erred in failing to hold an evidentiary hearing prior to denying Petitioner habeas corpus relief.

II.

STATEMENT OF THE CASE

The factual and procedural history of the underlying case is comprehensively set forth in this Court's opinion affirming Petitioner's conviction of voluntary manslaughter. *State v. Waldron*, 218 W. Va. 450, 624 S.E.2d 887 (2005).

On March 10, 2006, Petitioner filed a *pro se* Petition for Writ of Habeas Corpus alleging myriad grounds for relief.[1] The court below appointed counsel, who filed an amended petition adding meat to the bones of six of these issues:

Ground 17, State's knowing use of perjured testimony;

Ground 19, Unfulfilled plea bargains;

Ground 21, Ineffective assistance of counsel;

Ground 38, Refusal to turn over witness notes after witness had testified;

Ground 41, Constitutional errors in evidentiary rulings (specifically, gruesome photographs); and

Ground 42, Instructions to the jury (specifically, the modified *Allen*[2] charge).

A review of this Court's opinion in *State v. Waldron* reveals that four of these six issues, specifically, Grounds 19, 38, 41 and 42, were squarely addressed and rejected, leaving only Ground 17 and Ground 21 for consideration by the court below on habeas corpus.[3]

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[1]The petition alleged all conceivable grounds upon which the validity of a conviction may be attacked, fifty-three in all; most of the so-call grounds had no relevance whatsoever to this case and, with the exception of the six issues that are addressed herein, fell within this Court's well-established principle that "[a] mere recitation of any of our enumerated grounds without detailed factual support does not justify the issuance of a writ, the appointment of counsel, and the holding of a hearing." *Losh v. McKenzie*, 166 W. Va. 762, 771, 277 S.E.2d 606, 612 (1981). *See also Markley v. Coleman*, 215 W. Va. 729, 734, 601 S.E.2d 49, 54 (2004).

[2]*Allen v. United States*, 164 U.S. 492 (1896). The *Allen* charge, in its modified form, was approved by this Court in *State v. Blessing*, 175 W. Va. 132, 331 S.E.2d 863 (1985) (per curiam).

[3] "W. Va. Code § 53-4A-1(d) [1967] allows a petition for post-conviction habeas corpus relief to advance contentions or grounds which have been previously adjudicated only if those contentions or grounds are based upon subsequent court decisions which impose new substantive or procedural standards in criminal proceedings that are intended to be applied retroactively." *Bowman v. Leverette*, 169 W. Va. 589, 289 S.E.2d 435 (1982), Syl. Pt. 1.

Following some delay occasioned by the appointment of a special prosecutor, the court below issued its Memorandum Opinion on September 25, 2006, denying the petition for writ of habeas corpus. The court had not held a hearing and did not explain in its memorandum opinion why a hearing was not necessary.[4]

III.

ISSUE PRESENTED

Under the facts and circumstances of this case, the Petitioner was not entitled to a hearing on the issues raised in his Petition for Writ of Habeas Corpus.

IV.

ARGUMENT

UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, THE PETITIONER WAS NOT ENTITLED TOA HEARING ON THE ISSUES RAISED IN HIS PETITION FOR WRIT OF HABEAS CORPUS.

As set forth earlier in this brief, four of the six issues in the Amended Petition for Writ of Habeas Corpus have been previously adjudicated on the merits by this Court. *State v. Waldron*, 218 W. Va. 450, 624 S.E.2d 887 (2005). There have been no subsequent decisions which, if deemed

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[4]This was a violation of Rule 9(a) of the West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings, which provides in relevant part that "[i]f the court determines that an evidentiary hearing is not required, the court shall include in its final order specific findings of fact and conclusions of law as to why an evidentiary hearing was not required." Where, as here, an evidentiary hearing was not in fact required, the court's failure to explicate its reasons for denying one was harmless error. The only prejudice flowing from the court's violation of Rule 9(a) is that this Court does not have the benefit of the lower court's analysis.

retroactive and applied to the issues in *Waldron*, could lead to a different result. Therefore, pursuant to *Bowman v. Leverette*, 169 W. Va. 589, 289 S.E.2d 435 (1982), Syl. Pt. 1, the four issues are res judicata and required no hearing.

The remaining two issues in the Amended Petition for Writ of Habeas Corpus at least look "new" and therefore require closer examination.

1. Ground 17, State's Knowing Use Of Perjured Testimony.

The allegation in the Amended Petition is that because witness Mose Douglas Mullins gave testimony at the trial that differed from what was contained in his pre-trial statements, the trial testimony was necessarily perjurious and the prosecuting attorney must have known it.

First, none of this follows as a matter of logic, and the Petitioner's habeas petition contains no allegations of fact to support the claims of perjury and prosecutorial misconduct – just a *post hoc ergo propter hoc* inference.

> Upon information and belief, the Petitioner states that the State knowingly used perjured testimony against him in the underlying trial. Petitioner asserts that the co-defendant therein, Mose Douglas Mullins, gave numerous statements to authorities and the state regarding the Petitioner's participation in the crimes. On numerous occasions, said co-defendant failed to implicate, and even exonerated the Petitioner relative to said crimes. However, during the course of the trial therein, the co-defendant testified that the Petitioner was fully aware of the crimes and willingly participated for the sum of $1,000.00. Said $1,000.00 was, however, recovered from the person of the co-defendant, not the Petitioner.

Second, the case law is clear that prior inconsistent statements are a matter for cross examination and impeachment, which is exactly what occurred at the Petitioner's trial. *See, e.g.*, *State v. James Edward S.*, 184 W. Va. 408, 400 S.E.2d 843 (1990); *State v. Wood*, 194 W. Va. 525, 460 S.E.2d 771 (1995); *State v. Blake*, 197 W. Va. 700, 478 S.E.2d 550 (1996); W. Va. R. Evid. 613. At the trial, the co-defendant witness, Mr. Mullins, was subjected to extensive cross examination

– almost one hundred pages of grilling – about his testimony, including what was alleged to have been a critical enhancement of the Petitioner's role in the offense. (T.T. 310-398, 419-420) The jury, which heard all the evidence concerning Mr. Mullins' prior inconsistent statements, nonetheless concluded that the State had proved guilt beyond a reasonable doubt.

Thus, the issue of alleged perjurious testimony fails as a matter of law and required no hearing.

2. Ground 21, Ineffective Assistance Of Counsel.

The allegations in the Amended Complaint are quite specific: that counsel failed to adequately protect his interests during plea negotiations; that counsel failed to make timely objections as to notes being taken by the father of a prosecution witness; that counsel failed to object to the modified *Allen* charge given to the jury; and that counsel did not attend meetings where the Petitioner, pursuant to his plea agreement (later rejected by the court), gave information about the location of evidence.

The standard of review for claims of ineffective assistance of counsel is set forth in *State v. Frye*, 2006 WL 386363 (W. Va. 2006), Syl. Pt. 1:

> In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

In the case at bar, all of the allegations of ineffective assistance set forth in the Amended Petition fail as a matter of law under the second prong of the *Strickland* test and therefore require no hearing.

1. FAILURE TO PROTECT PETITIONER'S INTERESTS DURING PLEA NEGOTIATIONS. This Court squarely held in *State v. Waldron*, 218 W. Va. 450, 455-56, 624 S.E.2d 887, 892-93 (2005), that the trial court did not abuse its discretion in rejecting the plea agreement. Significantly, there was no allegation on appeal, and no allegation in this habeas hearing, that the evidence obtained by the State as a result of Petitioner's assistance was used against him at the trial.[5] Absent a violation of W. Va. R. Crim. P. 11(e)(6)(C) or (D), it cannot be said that but for counsel's failure to bring the proposed plea to the court before the Petitioner provided assistance to the authorities, the result of the proceedings would have been different. He would have had to enter into a different plea agreement (one calling for a felony conviction), or to go to trial, in either event.

2. FAILURE TO OBJECT TO NOTES TAKEN BY A COURT OBSERVER. This Court squarely held in *State v. Waldron, supra*, 218 W. Va. at 459, 624 S.E.2d at 896, that ". . . the trial court's destruction of the [court observer's] notes *did not prejudice Mr. Waldron*. . . ." (Emphasis supplied.) Therefore it cannot be said that but for counsel's failure to object, the result of the proceedings would have been different.

3. FAILURE TO OBJECT TO ALLEN CHARGE. This Court squarely held in *State v. Waldron, supra*, 218 W. Va. at 460, 624 S.E.2d at 897, that "[w]e find no error in the [Allen] instruction as given." Therefore it cannot be said that but for counsel's failure to object, the result of the proceedings would have been different.

4. FAILURE TO ATTEND MEETINGS WHEREIN PETITIONER GAVE INFORMATION TO THE AUTHORITIES. This allegation is subsumed in Petitioner's first

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[5]*See* W. Va. R. Crim. P. 11(e)(6)(C) & (D). *See also State v. Hanson*, 181 W. Va. 353, 382 S.E.2d 547 (1989); *State v. Casto*, 198 W. Va. 316, 480 S.E.2d 525 (1996).

ineffective assistance of counsel claim, failure to protect his interests during plea negotiations. For the reasons set forth infra, it cannot be said that but for counsel's failure to bring the proposed plea to the court before the Petitioner provided assistance to the authorities, the result of the proceedings would have been different.

V.

CONCLUSION

For the reasons set forth in this brief and apparent on the face of the record, this Court should affirm the judgment of the Circuit Court of McDowell County, West Virginia, denying the writ of habeas corpus.

TOM SCOTT, Southwestern Regional Jail Administrator,
JIM RUBENSTEIN, Commissioner, and
WEST VIRGINIA DIVISION OF CORRECTIONS,

Respondents

By Counsel

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ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

The undersigned, Barbara H. Allen, Managing Deputy Attorney General and counsel for Respondents, does hereby certify that a true and accurate copy of the foregoing "Brief of the Respondents" was served upon counsel for Petitioner by depositing the same in the United States mail, first-class postage prepaid, this 9th day of July, 2007, addressed as follows:

Jason R. Grubb, Esq.
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Beaver, WV 25813

Barbara H. Allen

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